United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7281

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

PRESCRIPTION PLAN SERVICE CORPORATION,

Plaintiff-Appellant,

-against-

ALBERT FRANCO, individually and as Administrator, SHANNON J. WALL, MARTIN F. HICKEY, MEL BARISIC, F.K. RILEY, JR., RICK MILLER, E. MARCUS, JAMES J. MARTIN, W.L. RISTINE, PETER BOCKER, E.G. DENYS, ANDREW RICH and KENNETH W. GUNDLING, individually and as Trustees of the NMU PENSION & WELFARE PLAN,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANTS-APPELLEES WALL, BARISIC, MILLER, MARTIN, BOCKER & RICH

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BRIEF ON BEHALF OF APPELLANTS WALL, BARISIC, MILLER, MARTIN, BOCKER and RICH

STATEMENT OF ISSUES PRESENTED

1. Whether a complaint alleging an action for fraud and deceit practiced on a contractor by the trustees and administrator of an employer funded pension and welfare plan sets forth a federal common law tort subject to the federal question jurisdiction of the district court.

2. Whether, for purposes of diversity jurisdiction, a trust is a "citizen" of each state of which its trustees are citizens.

3. Whether the New York trustees of the NMU Pension and Welfare Plan are indispensable parties for the purposes of this action.

4. Whether absent federal question and diversity jurisdiction over the trustees in their representative

capacities, diversity jurisdiction may be asserted over the "non-citizen" trustees individually in the action for fraud and deceit.

STATEMENT OF THE CASE

Plaintiff-Appellant, a New York Corporation engaged in the providing of administrative services in the field of pharmaceutical prescription benefit programs, instituted this action against the Administrator and ten of the twelve current and two past Trustees of the NMU Pension & Welfare Plan (hereinafter "Plan")(16a)*. Defendants Wall, Barisic, Miller, Martin, Bocker and Rich are the union Trustees of the Plan.

On or about December 22, 1972, plaintiff and the Plan entered into an agreement pursuant to which plaintiff was to manage and administer a pharmaceutical prescription program for the benefit of the Plan's eligible members (29a-36a). The parties terminated this agreement and, on or about January 29, 1974, entered into a second agreement, increasing the service fee paid to plaintiff (37a-44a). This second agreement was extended to run through June 30, 1975, at which time it would automatically expire unless the Plan gave 60 days notice that it wished to renew. (45a-47a) Dissatisfied with plaintiff's performance, the Plan, in or about April, 1975, gave plaintiff written notice

*References are to pages in the Joint Appendix.

that it wished to terminate the agreement as of June 30, 1975 (20a).

The complaint (3a-9a) alleges that the district court has jurisdiction over the subject matter of this action under Section 302(e) of the Labor-Management Relations Act (LMRA) as amended, 29 U.S.C. §186(e), the Welfare and Pension Plans Disclosure Act, 29 U.S.C. §301 and by reason of diversity of citizenship, 28 U.S.C. §1332.

Plaintiff asserts two causes of action. The first essentially alleges that plaintiff was fraudulently induced by defendants to enter into a contract to provide administrative services for a pharmaceutical prescription benefit program established by the Plan and the second cause of action alleges breach of contract by the defendants.*

The summons and complaint were served upon Ned. R. Phillips, then an attorney in the office of Abraham E. Freedman, co-counsel for the Plan (10a). Said firm has been designated by the Trustees as their agent for service of process upon them in their representative capacities. However, it was not designated to accept personal service where the Trustees were being sued as individuals. (62a-63a, 78a-79a) Personal

*The defendant concedes that there is no federal jurisdiction over the cause of action for breach of contract unless it is deemed pendent to the fraud action. Since it is clear that the district court lacked jurisdiction over the first cause of action pendent jurisdiction is absent. Also see Brief of Defendants-Appellees Franco, Hickey, Riley, Marcus, Ristine, Denys and Gundling, pp.30-31 for a convincing discussion establishing the absence of pendent jurisdiction.

service upon the individual Trustees has never been effected. (10a, 26a, 49a, 51a, 53a, 55a, 57a, 59a, 61a, 81a, 98a) and plaintiff recognizes and accepts this fact (73a).

Defendants moved to dismiss this action for lack of subject matter jurisdiction (11a, 64a). Plaintiff then cross-moved to eliminate the defendants who are citizens of New York (Messrs. Barisic and Miller).* It abandoned its allegation of federal question jurisdiction based upon a statute and claimed such jurisdiction on the cause of action for fraud and deceit founded upon its perception of a "federal common law tort". (68a-76a)

Honorable Gerard L. Goettel, District Court Judge for the Southern District of New York, dismissed this action for want of either federal question or diversity jurisdiction (86a-98a). This opinion is not yet officially reported.

*The parties agree that Albert Franco, Administrator of the Plan and also a New York citizen, is not a necessary party and can properly be eliminated as a defendant. The other defendants are citizens of New Jersey, Pennsylvania and Louisiana.

ARGUMENT

POINT I: THE FEDERAL DISTRICT COURT DOES NOT HAVE FEDERAL QUESTION JURISDICTION OVER THIS ACTION UNDER 28 U.S.C. §1331 SINCE NO FEDERAL COMMON LAW TORT MAY BE FOUND

Plaintiff-Appellant has abandoned its claim that the causes of action herein arise directly under any federal statute and instead now argues that its common law tort claim for fraud and deceit has a special federal flavor and should therefore be considered a "federal common law tort". (Appellant's Brief at pp. 9-10) This federal character supposedly derives from the provisions of Section 302(c)(5) of the LMRA, 29 U.S.C. §186(c)(5), which deals with the structure of joint employer-union pension and welfare plans and requires that the funds contributed to such plans be used "for the sole and exclusive benefit of the employes..., and their families and dependents". Plaintiff perceives further support for its position from subsections (d) and (e) of §302 which grant the federal district courts jurisdiction over willful violations of the Section.

This Circuit has consistently construed Section 302 in a narrow manner, limiting the federal courts' jurisdiction thereunder. See Cuff v. Gleason, 515 F.2d 127 (2d Cir. 1975); Beam v. International Organization of Masters, Mates and Pilots, 511 F.2d 975, 978-980 (2d Cir. 1975), both of which hold that there is no federal jurisdiction under Section 302(e) when the claim involves solely the application of pension plan

regulations but not the specific structural requirements of 302 (c)(5). Further, as the First Circuit noted in Bowers v. Ulpiano Casal, Inc., 393 F.2d 421, 424 (1st Cir. 1968), even where jurisdiction exists under 302, the plaintiff is limited to injunctive relief. In the instant action, plaintiff seeks what the statute does not authorize; that is legal, not equitable relief. Hence, plaintiff's position is far less tenable than that of the plaintiffs in J.I. Case Co. v. Borak, 377 U.S. 426 (1964), cited by plaintiff, who based their action on a statute which authorized legal and equitable relief.*

This Court, in Lugo v. Employees Retirement Fund of the Illumination Products Industry, 529 F.2d 251 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3221 (October 5, 1976), expressly rejected the invitation to develop a "federal common law" to be applied by the courts to regulate jointly-administered pension and welfare plans. Lugo involved an action by an "employee" (as defined by the statute) for benefits allegedly due from a jointly administered fund. Plaintiff alleged that he was a diabetic, eligible for a disability pension and that the plan suffered from a structural defect in that he was not permitted a hearing at which he could confront the evidence adverse to his case and present further evidence in his favor. The court upheld jurisdiction upon the allegation of a structural defect but dismissed the action on the merits. In its opinion, the court rejected plaintiff's argument that

*For a further discussion distinguishing J.I. Case Co., see this brief at pp. 7-8.

Subsections (c)(5) and (e) of Section 302 authorized the courts to create "a federal common law governing the management of pension plans." (Id. at 255) The court reasoned that such plans, being highly complex matters -- as indicated by the recently enacted Employee Retirement Income Security Act, 29 U.S.C. §1001 et seq. -- require expertise to be found in the Congress not the courts. Ibid.To the same effect, see Bowers v. Ulpiano Casal, Inc., supra, at 426, where the First Circuit held "that section 302(e) is not the foundation stone for federal court management of trust funds."

Plaintiff cites several cases where, in allegedly analogous situations, the federal court fashioned a remedy without specific statutory authority. However, in each of those cases, discussed hereinafter,the plaintiffs came within the penumbra of a specific statute, i.e., the plaintiff was a person whom the statute intended to protect. The plaintiff in the instant action admittedly is not a member of the class of persons for whose protection Section 302 was enacted. (Appellant's Brief pp. 9-10). Plaintiff is merely a party to a contract with a Plan regulated by the section.

In Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956), this Court authorized a civil rights action by black persons for violation of their rights by an air carrier since 49 U.S.C. §§484(b) and 622(a) make such discrimination unlawful. In Weinberger v. New York Stock Exchange, 335 F.Supp. 139 (S.D.N.Y. 1971), a limited partner in a brokerage house was found to be a third party beneficiary of a "contract" mandated by statute; and in J.I. Case Co. v. Borak,

supra, private investors were authorized to sue for damages based on the Securities and Exchange Act, as they were intended benefactors of that Act's protection. These cases, therefore, do not support Prescription Plan's position.

Likewise, Textile Workers' Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957), does not support plaintiff's assertion of a common law tort. That case dealt with a controversy (involving a collective bargaining agreement) over which the federal court specifically had jurisdiction under Section 301(a) of the LMRA, 29 U.S.C. §185(a). The issue confronted by Mr. Justice Douglas was what law to apply once the court had jurisdiction. In this case, plaintiff attempts to manfacture jurisdiction out of thin air simply because one of the parties is partially regulated by federal statute.

It is clear that the grant of federal jurisdiction contained in §302 is to be narrowly construed so as to not to unduly involve the district courts in the routine daily affairs of jointly administered pension and welfare plans. It is even clearer that no federal common law tort will lie when the plaintiff is not one within the penumbra of the statute's protection. The district court, therefore, correctly held that there was no federal jurisdiction over defendants for the first cause of action for fraud and deceit. See Hibernia Bank v. International Brotherhood of Teamsters, 411 F.Supp.478, 488 (N.D. Calif. 1976) where the court held that allegations of fraud against trustees of a welfare fund set forth a state claim and were not part of any §302 violations.

POINT II: A TRUST, FOR PURPOSES OF DIVERSITY, IS A "CITIZEN" OF EACH STATE OF WHICH ITS TRUSTEES ARE CITIZENS

Federal Rule of Civil Procedure 17(b) provides that the law of the state in which the district court is situated should be applied to determine the capacity of an entity other than a natural person or a corporation to sue or to be sued. Under New York law, an action to recover trust funds may only be brought against the trustees, not against the trust as an entity. Kane v. Lewis, 282 App. Div. 529 (3d Dept. 1953), Conway v. Cross, 16 M.2d 451 (Sup. Ct. N.Y. Co. 1958).

It is to the citizenship of the trustees to which the court must turn to determine the existence of diversity jurisdiction. In Blake v. McKim, 103 U.S. 336 (1881), the first Mr. Justice Harlan, speaking for a unanimous Court, held that diversity was lacking when some of the executors of the estate against which a claim was leveled were citizens of the same state as the plaintiff.

Similarly, in Waxman v. Kealoha, 296 F.Supp. 1190 (D. Haw. 1969), the court looked to the citizenship of the trustee in bankruptcy (Canadian), rather than that of the bankrupt corporation (Hawaiian) and found diversity. As the court stated:

> "The rule has long been that representatives such as executors, administrators, guardians, trustees or receivers stand upon their own citizenship in federal courts..." Id. at 1192.

Suchem, Inc. v. Central Aguirre Sugar Co., 52 F.R.D. 348 (D. P.R. 1971) involved a corporate trust established under

Puerto Rican law. Since the plaintiff and five of the eleven trustees of the defendant were citizens of Puerto Rico, the court held that diversity of citizenship did not exist (Id. at 354). A parallel situation exists here. The Plan is headquartered in New York and established pursuant to the laws of that State. Plaintiff and two of the Plan's twelve trustees are citizens of New York.

In the analogous situations of partnerships and unincorporated associations, the courts have looked to the citizenship of the partners or members, respectively. See United Steelworkers of America v. R.H. Bouligny, Inc., 362 U.S. 145 (1965) - a union, an unincorporated association, is a "citizen" for diversity purposes of every state in which it has a member. See also Woodward v. D.H. Overmyer Co., 428 F.2d 880, 883 (2d Cir. 1970), cert. denied 400 U.S. 993 (1971) (partners); Lewis v. Odell, 503 F.2d 445, 446 (2d Cir. 1974) (partners); Chase Manhattan Mortgage & Realty Trust v. Pendley, 405 F. Supp. 593 (N.D. Ga. 1975) and Larwin Mortgage Investors v. Riverdrive Mall, Inc., 392 F. Supp. 97 (S.D. Tex. 1975) (Real Estate Investment Trusts).

In this action, two of the Plan trustees and, hence, the trust are citizens of New York, as is the plaintiff. Diversity is thus clearly lacking as a basis of federal jurisdiction.

POINT III: THE NEW YORK TRUSTEES ARE INDISPENSABLE PARTIES TO THIS ACTION

Plaintiff asserts that diversity jurisdiction may be found if only it were permitted to delete Messrs. Barisic and Miller, both of whom are New York citizens, as named defendants. This argument is clearly without merit since all of the trustees are indispensable parties.

All fiduciaries have long been held to be indispensable parties in actions against the funds which they control. In Blake v. McKim, supra, the Supreme Court held that all executors of an estate - each of whom had qualified and acted in the execution of a trust - were indispensable parties to an action against the fund, and thus no diversity jurisdiction existed when some of the executors were citizens of the same state as the plaintiff. Also, see Connolly v. Wells, 33 Fed. 205 (E.D. Wis. 1887), and the sources discussed therein.

Caylor v. Cooper, 165 Fed. 757 (S.D.N.Y. 1908), involved a trustee suing to determine to whom the assets of a fund were to be distributed. His co-trustee was one of the claimants, and, therefore, did not join as a plaintiff. The Court held that the "absent" trustee was indispensable to the action and had to be joined as a party plaintiff. Since this joinder would defeat diversity, the court lacked jurisdiction. The court stated the "general rule" as follows:

> "...two or more executors under the same instrument...or two or more trustees, are one and the same person. Where two are sued, and an accounting is demanded, unless it relates to a wrong or devastavit committed by one alone, all are regarded as indispensable parties." (at 764)

Also see Kelley v. Queeney, 41 F. Supp. 1015, 1018 (W.D.N.Y. 1941).

The complaint in this action alleges fraud and deceit by the trustees acting in concert, not alone. All of the trustees are, thus, indispensable parties within the meaning of established case law. The absence here of any allegation of individual misconduct clearly differentiates this case from Booth v. Security Mutual Life Ins. Co., 155 F. Supp. 755 (D.N.J. 1957) relied upon by plaintiff. Further, in Booth, the trustees not joined as defendants were not subject to the court's jurisdiction, whereas, in the instant action, plaintiff wants to eliminate the only defendants who are citizens of the state in which the court is situated.

In Morrissey v. Curran, 88 LRRM 3356, 76 CCH Lab. Cas. ¶10695 (S.D.N.Y. 1975), the court held that all the trustees of the NMU Pension & Welfare Fund, the very fund involved here, were indispensable parties in an action by fund participants alleging Section 302 violations. The employer trustees were not joined as defendants in Morrissey. The court found that since they

> "have a material legal interest in the fund which will be inevitably affected by any judgment rendered in this case, they are clearly indispensable parties under Rule 19(a) F.R. Civ. P." (at 3361, 76 Lab.Cas. at P. 18374)

The applicability of this decision to the trustees of the same fund cannot be seriously questioned. All trustees of the NMU Pension & Welfare Plan are therefore indispensable parties when there is a claim against the fund for which they are or may be responsible.

Moreover, as Judge Goettel stated in his decision below, Mr. Barisic, a New York citizen whom plaintiff would like to eliminate as a party, was one of the two trustees who signed the contracts at issue. He undoubtedly is an indispensable party to the litigation.

In its strenuous - and strained - efforts to retain federal jurisdiction by eliminating the New York trustees as defendants, plaintiff relies heavily on Provident Tradesmens Bank & Trust Co.v. Patterson, 390 U.S. 102 (1968). Provident was an action seeking declaratory judgment that a driver involved in an automobile accident was using the car with the owner's permission, thereby rendering the owner's insurance company liable. Service of process upon the owner in Provident was not required to obtain jurisdiction over the fund (the insurance policy) from which the plaintiff was seeking recovery. As noted above, the situation here is quite the opposite - the Plan cannot be sued and its assets cannot be reached except through its trustees.

The Court in Provident put great stress on the fact that neither the insurance company nor the insured ever raised the issue of whether the insured was an indispensable party, but rather that issue was raised by the Third Circuit sua sponte after a complete trial had been had. Defendants here raised the issue at the earliest possible moment - in their papers responding to plaintiff's attempt to drop Messrs. Barisic and Miller as defendants. Thus, Provident and the instant action are clearly distinguishable.

Notwithstanding the inapplicability of Provident on its facts that case does set forth criteria which are to be looked to in each case to determine whether "in equity and good conscience" an action should proceed absent a non-joined party. These interests are (1) that of the plaintiff in having a forum; (2) that of the defendant(s) to avoid multiple litigation, inconsistent relief, or sole responsibility for shared liability; (3) that of the outsider whose joinder is desirable to protect his rights, obligations, or interest in the subject matter; and (4) that of the courts and public in complete, consistent and efficient settlement of disputes. Id. at 109-111. Application of these criteria to the facts of the instant case can only lead to the conclusion that the New York trustees are indispensable parties.

Plaintiff has no true interest - as opposed to a preference - in a federal forum. Plaintiff can obtain jurisdiction over all the Plan's trustees qua trustees in the courts of the State of New York under New York's long-arm statute - CPLR §302. This is so since the alleged acts and transactions forming the basis of plaintiff's action are claimed to have taken place in New York. Dismissal of the complaint herein thus does not result in depriving plaintiff of a forum in which to adjudicate its claims.

When considering the other criteria stated in Provident, the equities are clearly on the side of defendants. If plaintiff is allowed to sever its actions against the New York trustees, defendants face a real possibility of multiple litigation. This

would be a grossly inefficient use of the courts' time and could result in conflicting opinions. Such an outcome should be guarded against with particular care when, as here, there are no allegations of individual liability on the part of any trustee, but only of shared liability. If plaintiff did not maintain a separate action against the non-joined trustees, such trustees would be unable to participate in an action affecting Plan assets for which they share responsibility.

POINT IV: DIVERSITY JURISDICTION MAY NOT BE ASSERTED OVER THE "NON-CITIZEN" TRUSTEES SUED IN THEIR INDIVIDUAL CAPACITIES

Plaintiff's final fall-back position is that it has an action for fraud and deceit against each of the trustees in his individual capacity and therefore can obtain diversity jurisdiction over those trustees who are not New York citizens. This position is completely untenable since plaintiff has not effected personal service upon the trustees as individuals and the complaint would not support a judgment of individual liability.

The District Court held that the trustees were not individually served with process in this action (98a). Plaintiff has conceded this lack of personal service (73a) and has not remedied this deficiency even after it has been called to its attention. Thus, consideration of the merits vel non of plaintiff's claim of individual responsibility is clearly premature.

The complaint refers solely to allegedly fraudulent and deceitful actions of the defendants acting in concert in their representational capacities as Plan trustees. There are no allegations which would support a finding of individual responsibility for an act or transaction within New York State by any "non-citizen" trustee.* The question of in personam jurisdiction of a district court sitting in New York is governed by New York's long-arm statute, CPLR §302.** New York law does not permit long arm jurisdiction over non-resident defendants sued for acts committed in their representational capacities. Lehigh Valley Industries, Inc., v. Birenbaum, 389 F. Supp. 798, 804 (S.D.N.Y. 1975), aff'd ,527 F.2d 87, 92-93 (2d Cir. 1975).

In Lehigh Valley, plaintiffs sued an individual whose only relevant actions in the State involved appearances as a corporate representative for business purposes. The District Court refused to find a jurisdictional basis for the suit, stating as follows:

*On a jurisdictional motion, the plaintiff must assert some details which would provide a prima facie link between the particular defendant(s) and an act or transaction in New York. Lehigh Valley Industries, Inc. v. Birenbaum, 389 F. Supp. 798, 807 (S.D.N.Y. 1975), aff'd 527 F.2d 87 (2d Cir. 1975); Socialist Workers Party v. Attorney General of the United States, 375 F. Supp. 318 (S.D.N.Y. 1974).

** CPLR § 302 is made applicable here by Fed. R. Civ. P. 4(e).

> "It is axiomatic that jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation. That is to say, an individual's transaction of business within the state solely as an officer of a corporation does not create personal jurisdiction over that individual. Path Instruments International Corp. v. Asahi Optical Co., 312 F.Supp. 805 (S.D.N.Y. 1970); Schenin v. Mirco Copper Corp., 272 F. Supp. 523 (S.D.N.Y. 1967); Unicon Management Corp. v. Koppers Co., 250 F.Supp. 856 (S.D.N.Y. 1966); Yardis Corp. v. Cirami, 76 Misc. 2d 793, 351 N.Y.S. 2d 586 (1974)." Id. at 803-804.

Therefore, the trustees are not subject to in personam jurisdiction in New York as their appearances within the State in connection with the alleged transactions were solely in their capacities as trustees.

CONCLUSION

The decision of the District Court dismissing the complaint for lack of jurisdiction should be affirmed.

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UNITED STATES COURT OF APPEALS
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Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 3rd *day of* November *19* 76 *at* 1) 300 Park Avenue, New York, New York
2) 15 Park Row, New York, New York

deponent served the annexed Brief *upon*

1) Proskauer Rose Goetz & Mendelsohn
2) Milton Hoscowitz

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 3rd
day of November *19* 76

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Reuben Shearer

Reuben Shearer